Filed 7/31/02 P. v. Vargas CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON MARTINEZ VARGAS,

Defendant and Appellant.

F037732 & F039334

(Super. Ct. No. SC081553A)

# OPINION

APPEALS from a judgment of the Superior Court of Kern County. Clarence Westra, Jr., Judge.

Alister McAlister, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stephen G. Herndon and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jason Martinez Vargas was convicted of four counts of second degree robbery. The jury found true the enhancements for use of a firearm and for committing the crime to promote a criminal street gang. He was sentenced to prison for a term of 29 years 4 months.

Vargas contends his sentence constitutes cruel and/or unusual punishment in violation of both the United States and California Constitutions and also violates his

constitutional right to equal protection and due process. Vargas further argues the sentence for the gang enhancement should be stayed by the provisions of Penal Code[1] section 654, the prosecutor and probation department erroneously referred to a rejected plea agreement at the sentencing hearing, and that his sentence was improperly increased after recall (§ 1170, subd. (d)) when the trial court imposed a gang registration requirement. (§ 186.30.) Finding no merit to any of these contentions, we affirm the judgment.

## FACTUAL AND PROCEDURAL SUMMARY

We provide only a brief summary of the evidence since Vargas does not contest the sufficiency of the evidence.

Vargas and three or four of his friends, all members of the Okie Baker criminal street gang, went swimming in the Kern River. The victims, Michael, Rudolpho, Julio, and Jose, parked about 50 yards from Vargas's group. The Vargas group drove up to the victims and jumped out of their car. Vargas immediately displayed a gun and told the victims not to resist, or he would "buck" (i.e., shoot) them. Vargas watched his friends assault the victims and steal numerous items of minimal value, including the keys to Michael's car. Comments were made about the Okie Bakers' superiority to people from the victims' hometown. The perpetrators escaped in their car.

Unfortunately for Vargas, one of the victims spent time in juvenile hall with one of the perpetrators. The sheriff's department was called and the perpetrators were quickly identified. Vargas eluded arrest for approximately two months.

The information charged Vargas with four counts of second degree robbery. (§ 212.5, subd. (c).) Each count alleged (1) that Vargas personally used a firearm during the commission of the offense (§ 12022.53, subd. (b)), (2) that the crime was committed in association with a criminal street gang with the intent to promote criminal conduct by gang members (§ 186.22, subd. (b)(1)), and (3) that Vargas was on bail in another offense when

[1]Further statutory references are to the Penal Code unless otherwise indicated.

he committed this offense (§ 12022.1). Vargas was also charged with one count of failing to appear while released on bail in another matter. (§ 1320.5.)

The jury found Vargas guilty of four counts of second degree robbery and found true the allegations that Vargas personally used a firearm and that the crime was perpetrated in association with a criminal street gang. In a bifurcated proceeding, the trial court found Vargas not guilty on the fifth count, and found the "on bail" enhancement had not been proven beyond a reasonable doubt. Vargas was sentenced to a total of 29 years 4 months in prison.[2] On count 1, the court imposed the upper term of five years, enhanced by 10 years for the firearm enhancement and 10 years for the street gang enhancement. A consecutive term of one year was imposed for count 2, along with three years four months for the firearm enhancement. The trial court stayed the sentence on all remaining gang enhancements. The sentences for counts 3 and 4, along with the firearm enhancements, were imposed concurrent with the sentence for count 1.[3]

## DISCUSSION

### I. Cruel and/or Unusual Punishment

Vargas begins his assault on his sentence by contending that it constitutes cruel and/or unusual punishment in violation of the Eighth Amendment to the United States Constitution, and article I, section 17 of the California Constitution.

#### A. The Eighth Amendment

In *Rummel v. Estelle* (1980) 445 U.S. 263 (*Rummel*) the Supreme Court addressed the Eighth Amendment's prohibition against cruel and unusual punishment in the context of a recidivist statute. The defendant had been twice convicted of felonies and served prison

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[2]After the notice of appeal was filed in case No. F037732, the trial court granted Vargas's motion to recall his original sentence. We refer to the sentence imposed on resentencing. Vargas appealed the resentence. (Filed Nov. 8, 2002, case No. F039334.) We granted Vargas's motion to consolidate the two appeals.

[3]An eight-month sentence was also imposed on an unrelated conviction for possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).)

sentences, once for fraudulent use of a credit card and once for passing a forged check. The current conviction was for obtaining $120.75 by false pretenses. The defendant was sentenced to life in prison, but was eligible for parole after 12 years.

The Supreme Court held that the sentence did not violate the Eighth Amendment. (*Rummel, supra*, 445 U.S. at p. 285.) The opinion emphasized two salient points. First, the Legislature determines the punishment applied to criminals. Second, Eighth Amendment proportionality analysis is seldom applied by the court to any sentence other than death. (*Id.* at pp. 272, 275-276, 282-284.) The court also recognized the difficulty encountered in comparing statutory schemes of different states. (*Id.* at pp. 279-282.)

In *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*) the Supreme Court addressed the question of whether a life sentence without the possibility of parole for a seventh nonviolent felony violated the Eighth Amendment. The court held that a criminal sentence must be proportionate to the crime for which the defendant is convicted. (*Solem*, at p. 290.) In analyzing this issue, the court held that several objective factors should be considered. First, the gravity of the offense and the harshness of the penalty. (*Id*. at pp. 290-291.) Second, the sentences imposed on other criminals in the same jurisdiction. (*Id*. at p. 291.) Third, a comparison of the sentences imposed for commission of the same crime in other jurisdictions. (*Id*. at pp. 291-292.) After applying these factors, the court held the sentence violated the Eighth Amendment. (*Solem, supra,* at p. 303.)

A five-to-four majority decided both *Rummel* and *Solem.* The most recent Supreme Court case addressing the Eighth Amendment, *Harmelin v. Michigan* (1991) 501 U.S. 957, obtained a majority only in affirming the judgment. The defendant in *Harmelin* was convicted of possession of 672 grams of cocaine and sentenced to a mandatory term of life in prison without the possibility of parole, even though he had no prior criminal convictions. The majority held only that a mandatory sentence which is not otherwise cruel and unusual did not violate the Eighth Amendment simply because there was no possibility of sentence mitigation. (*Id*. at p. 995.)

The plurality opinion, authored by Justice Scalia and joined by Chief Justice Rehnquist, concluded that *Solem* was incorrect and that the Eighth Amendment did not contain a proportionality guarantee in a noncapital case. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 965.)

Justice Kennedy, joined by Justices O'Connor and Souter, concurred in the judgment, but disagreed with Justice Scalia's conclusion that the Eighth Amendment did not contain a proportionality guarantee. (*Harmelin v. Michigan, supra,* 501 U.S. at pp. 997-998.) Justice Kennedy concluded the Eighth Amendment does not require strict proportionality between crime and sentence, but rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime. (*Id*. at p. 1001.) This conclusion was based on four principles. First, the fixing of prison terms for a specific crime involves a substantive penological judgment that is properly within the province of the legislatures. (*Id*. at p. 998.) Second, the Eighth Amendment does not require adoption of only one penological theory by all states. (*Harmelin v. Michigan, supra,* at p. 999.) Third, differences in underlying theories of sentencing and in the length of prescribed prison terms are inevitable in the federal structure. (*Ibid*.) Finally, review by federal courts should be based on objective factors to the maximum extent possible, with the most prominent objective factor being the type of punishment imposed, i.e., death or imprisonment. (*Id*. at p. 1000.)

In an attempt to reconcile Eighth Amendment jurisprudence, Justice Kennedy concluded that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1005.) He concluded that the defendant's sentence did not exceed the threshold inference of gross disproportionality. (*Ibid*.)

Justices White, Stevens, Blackmun and Marshall dissented, arguing the Eighth Amendment contains the proportionality guarantee described in *Solem.* (*Harmelin v. Michigan, supra,* 501 U.S. at pp. 1009-1029.)

*Harmelin* leaves the current state of Eighth Amendment jurisprudence unclear. We note that the Supreme Court has recently granted review of two cases that confront the question of whether California's three strikes law, as applied, constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*Andrade v. Attorney General of State of California* (9th Cir. 2001) 270 F.3d 743, cert. granted *sub nom. Lockyer v. Andrade* (2002) __ U.S. __ [122 S.Ct. 1434, 152 L.Ed.2d 379]; *People v. Ewing*, cert. granted Apr. 1, 2002, No. 01-6978, __ U.S. __ [122 S.Ct. 1435, 152 L.Ed.2d 379].) At this time, the most that can be said is that the threshold inquiry is whether a comparison of the crime committed and the sentence imposed lead to an inference of gross disproportionality. We are also confident that *Solem*, despite Justice Kennedy's attempt at reconciliation, does not represent the current state of Eighth Amendment jurisprudence.

As in *Harmelin*, we do not find that the sentence in this case leads to an inference of gross disproportionality, and thus conclude there is no Eighth Amendment violation. The defendant in *Harmelin* was convicted of a single count of possession of cocaine for sale and was sentenced to a term of life in prison without the possibility of parole. Vargas was convicted of four counts of armed robbery for the benefit of a criminal street gang. He was sentenced to prison for 29 years 4 months and will be eligible for parole in approximately 25 years. Neither case involved serious injury to another, although Vargas's use of a handgun increased the potential for injury.

The Legislature has determined that crimes involving use of a firearm and crimes committed for the benefit of a criminal street gang are serious offenses that require increased punishment. Our agreement with this assessment is unnecessary. It is the Legislature's responsibility to make these determinations. Our review is limited to determining if the statute is constitutionally suspect. The statute as applied in this case is not.

Because Vargas's sentence does not lead to an inference of gross disproportionality, the Eighth Amendment does not require a comparison of his sentence to other sentences

both within and outside the jurisdiction. Nor do the other arguments advanced by Vargas persuade us that this sentence violates the Constitution.

Throughout his argument, Vargas fails to recognize that he was sentenced for four counts of armed robbery, not a single count. This failure impliedly acknowledges the weakness in the argument. Likewise, his reliance on the minimal value of the taken items is disingenuous. The relatively meager booty is a reflection on a poor choice of victims, not reduced culpability. The range of punishment is the same regardless of the success of the endeavor.

**B. The California Constitution**

Punishment may violate the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) The *Lynch* court established three techniques to administer this rule. First, courts should examine the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Id*. at p. 425.) Second, courts should compare the punishment with the penalty for more serious crimes in the same jurisdiction. (*Id*. at p. 426.) Third, courts should compare the punishment to the penalty for the same offense in different jurisdictions. (*Id*. at p. 427.)

***1. The nature of the offense and the offender***

Vargas argues at length that the nature of the offense does not justify the sentence received, but he ignores the nature of the offender. As discussed *ante*, we reject the claim that the nature of the offense does not justify the sentence. The offense had the potential for great violence had the victims resisted. Four victims were held at bay by Vargas's threats. Moreover, the sentence reflects not only the crime of robbery, but also the use of a firearm, increasing the potential for violence, and the fact that the crime was committed to promote a criminal street gang. When all factors are considered, the sentence is amply supported by the nature of the offense.

Vargas's decision to ignore the nature of the offender is an implied concession that this factor also supports the sentence. The probation report reflects that Vargas was convicted, admitted, or was charged with: misdemeanor unlawfully causing a fire (§ 452, subd. (d)), first degree burglary (§ 460, subd. (a)), two counts of battery (§§ 243, 243.2), being under the influence of marijuana (§ 647), unlawful possession of a prescription drug (Health & Saf. Code, § 11377, subd. (a)), driving with a suspended license (Veh. Code, § 14601.1, subd. (a)), possession of a restricted weapon for the benefit of a criminal street gang (§§ 12020, subd. (a), 186.22, subd. (b)), and exhibition of a firearm during a fight (§ 417, subd. (a)(2)). Vargas was also charged with carjacking (§ 215, subd. (a)), but the charges were dropped when the victims were unavailable to testify.[4] The sum total of these factors leads to the inevitable conclusion that the nature of the offender supports the sentence imposed.

***2. Comparison with more serious crimes in California***

The second *Lynch* technique requires a comparison of the sentence in this case with other more serious crimes within California. (*In re Lynch*, *supra*, 8 Cal.3d at p. 426.) Vargas uses a broad brush to claim that a sentence of 29 years is greater than that imposed in most third strike convictions, most murders, and most sex crimes. Vargas ignores the two enhancements to the sentence and the fact that he was convicted of multiple counts.

If we were to compare only the sentence for a single robbery with those crimes identified by Vargas, the maximum sentence to which Vargas was exposed (five years) is entirely consistent with the other punishment schemes.[5] Such comparison must also

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[4]This charge will be discussed in more depth in part IV, *post*.

[5]Punishment for a third strike is 25 years (§ 667, subds. (b)-(i)). The punishment for first degree murder includes death, life in prison without the possibility of parole, or 25 years to life (*id.*, subd. (a)). For second degree murder, the punishment ranges from life without the possibility of parole (*id.*, subd. (c)) to 20 years to life (*id.*, subd. (d)). For manslaughter, the punishment ranges from a maximum of 11 years to a minimum of one year. (§ 193.) The punishment for rape is a minimum of three years and a maximum of eight years. (§ 264.)

consider the other punishment schemes when the hypothetical defendant is convicted of four counts of each crime. If we consider the other punishment schemes when they include convictions for four counts and enhancements for each count for the use of a firearm and commission of the crime to promote a criminal street gang, the potential punishment for each crime identified by Vargas greatly exceeds the sentence imposed on Vargas.[6] Thus, we reject Vargas's superficial analysis.

Although not clearly stated, it appears Vargas is arguing the enhancements themselves constitute cruel or unusual punishment. *People v. Martinez* (1999) 76 Cal.App.4th 489, 494-496 rejected the argument that section 12022.53 constituted cruel or unusual punishment, and *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212-1215 rejected the claim that section 12022.53 was unconstitutional. We find the reasoning of these cases compelling and agree there is no constitutional infirmity to this section.

Although we did not locate any decision which addressed the issue of whether section 186.22 constituted cruel or unusual punishment, the guidance provided in *Martinez* and *Zepeda* convinces us that the claim must be rejected. These cases recognized the Legislature's role in crafting punishment and the great deference that the judicial branch gives to legislative determinations. (*People v. Zepeda*, *supra*, 87 Cal.App.4th at pp. 1213-1214; *People v. Martinez*, *supra*, 76 Cal.App.4th at pp. 494.)

In enacting the Street Terrorism Enforcement and Prevention Act, of which section 186.22 is a part, the Legislature found that violent street gangs created a state of crisis presenting a clear and present danger to public order and safety. (§ 186.21.) The enhancement found in section 186.22 merely reflects the Legislature's determination that increased punishment is necessary to rectify the crisis created by criminal street gangs.

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[6]For example, an aggravated sentence for four counts of rape with the same enhancements could result in a total sentence of 56 years (8 years + (1/3 × 8) + (1/3 × 8) + (1/3 × 8) + 10 + (1/3 × 10) + (1/3 × 10) + (1/3 × 10) + 10 + (1/3 × 10) + (1/3 × 10) + (1/3 × 10)).

We defer to this determination and cannot conclude that the section on its face constitutes cruel or unusual punishment.

### *3. Interjurisdictional analysis*

Vargas provided a detailed list of statutory references to firearm enhancements for robbery convictions in other jurisdictions. However, his summary of this data reveals that this enhancement is not unconstitutional. Vargas asserts that 11 other states would sentence him to at least 10 years in prison, and that three states would sentence him to terms in excess of 12 years, with the longest term being 20 years. By comparison, California's 13-year midterm is not constitutionally suspect.

Vargas's analysis loses all credibility when he attempts to compare his actual sentence with sentences in other jurisdictions for armed robbery because he does not take into account his 10-year enhancement for promoting a criminal street gang. There is no basis for comparison because there is no attempt to determine the additional punishment Vargas would receive in other states for his gang participation. Therefore, Vargas has waived any claim that his sentence is unconstitutional when compared to sentences for similar crimes in other jurisdictions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 153.)

## II. Due Process and Equal Protection

Vargas contends that section 12022.53 violates the due process and equal protection clauses of both the state and federal Constitutions. Vargas makes a very general argument without distinguishing between the distinct concepts of due process and equal protection. His sole assertion is that a statute that does not serve a legitimate state interest is unconstitutional. According to Vargas, section 12022.53 does not serve a legitimate state interest because (1) it treats gun users more harshly than other perpetrators who use other weapons, (2) it does not allow consideration of the degree of culpability of the defendant, (3) it punishes more harshly than other similar statutes, and (4) it is more severe than similar sentences in other jurisdictions.

We reject Vargas's contention for a variety of reasons. First, Vargas has not briefed the issue in a manner that allows us to determine how he claims either the equal protection

or due process clauses were offended. Nor does Vargas cite any relevant authority to illuminate the road in our constitutional journey. We are left attempting to find our way down a winding road in complete darkness. We are unable and unwilling to do so. (*People v. Crittenden, supra*, 9 Cal.4th at p. 153.)

Nor does Vargas fair any better if we consider the merits of what it appears he is arguing. The equal protection clauses of both the state and federal Constitutions protect similarly situated individuals from disparate treatment by the state. (*People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1114-1115.) Vargas makes no effort to inform this court to what group he belongs or how he is treated unequally.

We can infer from his arguments that he asserts that other criminals who do not use a gun when committing crimes are treated more leniently. However, *Alvarez* rejected this argument, finding there was a compelling state interest for treating a defendant who used a gun differently from those who did not. (*People v. Alvarez, supra*, 88 Cal.App.4th at pp. 1116-1118.)

The mandatory nature of the enhancement, the claimed disproportionality with other sentencing statutes, and the claimed discretion provided to the prosecutor all do not implicate due process concerns. Moreover, each of these arguments has been rejected in similar contexts. (*People v. Zepeda, supra*, 87 Cal.App.4th at pp. 1214-1215 [§ 12022.53 was not cruel or unusual because it was mandatory in nature and did not consider mitigating factors]; *People v. Martinez, supra*, 76 Cal.App.4th at p. 495 [§ 12022.53 recognizes gradations in culpability since use of a firearm is punished less severely than discharge and discharge causing great bodily injury]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 14-18 [prosecutorial discretion in charging enhancement did not violate equal protection clause and disproportionality does not cause the section to violate Eighth Amendment].)

Nor is there any merit to Vargas's due process challenge. Due process requires fundamental fairness in the criminal procedures by which a defendant is convicted of a crime. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564.) With the possible exception of the argument that the

statute presents the prosecutor with excess charging discretion, Vargas does not identify any procedure that resulted in a conviction that was fundamentally unfair. Instead, the focus is on the mantra that the length of the sentence is unfair. A lengthy sentence does not mean that the procedure by which it was imposed was fundamentally unfair.

**III. Section 654**

Vargas asserts the trial court erred when it failed to stay imposition of the section 186.22 enhancement pursuant to section 654. As pertinent to this case, section 654, subdivision (a) states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

> "Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.)

Vargas makes two separate arguments in support of his contention. First, he asserts there was only a single criminal objective, armed robbery. Therefore, the section 654 stay precludes multiple punishment. Second, he contends the enhancement goes to the nature of the offense. According to Vargas, *People v. Coronado* (1995) 12 Cal.4th 145 and *People v. Arndt* (1999) 76 Cal.App.4th 387 imply that enhancements which go to the nature of the offense should be stayed by section 654.

Contrary to Vargas's assertion, it is not "needless rhetoric" to distinguish between the objective for committing the robbery and the objective for promoting a criminal street gang. This issue was discussed in *People v. Herrera* (1999) 70 Cal.App.4th 1456. The defendant in *Herrera* was convicted of various charges as the result of a drive-by shooting,

including attempted murder and violation of section 186.22, subdivision (a). The defendant argued that his objective for both crimes was identical, and therefore, the sentence for street terrorism (§ 186.22, subd. (a)) should be stayed. The appellate court disagreed.

> "[S]ection 186.22, subdivision (a), encompasses a more complex intent and objective. It is part of the Street Terrorism Enforcement and Prevention Act which was enacted by emergency legislation in 1988. [Citation.] The Legislature passed these criminal penalties and strong economic sanctions as a response to the increasing violence of street gang members throughout the state. Previously, there was no existing law that made the punishment for crimes by a gang member separate and distinct from that of the underlying crimes. [Citation.]
>
> "Section 186.22, subdivision (a) punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a substantive offense whose gravamen is the *participation in the gang itself*. Hence, under section 186.22, subdivision (a) the defendant must necessarily have the intent and objective to actively participate in a criminal street gang. However, he does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) because the focus of the street terrorism statute is upon the defendant's objective to promote, further or assist the gang in its felonious conduct, irrespective of who actually commits the offense. For example, this subdivision would allow convictions against both the person who pulls the trigger in a drive-by murder *and* the gang member who later conceals the weapon, even though the latter member never had the specific intent to kill. Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,]' thereby precluding application of section 654. [Citation.]" (*People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1467-1468, fns. omitted.)

Section 186.22, subdivision (b)(1) adds a sentencing enhancement when a felony is committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members …." It requires the intent and objective to promote, further, or assist in criminal conduct by gang members. In contrast, the underlying felony in this case, robbery, requires the intent to steal another's property by means of force or fear. It is a crime against property. The objectives of robbery and the gang enhancement are separate and distinct.

The question of whether the defendant held multiple criminal objectives is one of fact for the trial court, and, if supported by substantial evidence, its finding will be upheld on appeal. (*People v. Braz* (1997) 57 Cal.App.4th 1, 10; *People v. Osband* (1996) 13 Cal.4th 622, 730-731.) There was substantial evidence in this case to support the conclusion that Vargas entertained separate criminal objectives. Regardless, Vargas's failure to brief the issue has resulted in a waiver of the claim that there is not substantial evidence to find separate criminal objectives. (*People v. Crittenden, supra,* 9 Cal.4th at p. 153.)

Nor does Vargas's second contention fare any better. In *People v. Coronado, supra,* 12 Cal.4th 145, the defendant suffered a prior conviction and served a prison term for felony drunk driving. (Veh. Code, § 23152, subd. (a).) He was convicted for another incident of drunk driving (Veh. Code, § 23152, subd. (a)) and admitted three prior prison terms. One of the prior prison terms was the prior felony drunk driving conviction. This conviction was used to elevate the current conviction to a felony pursuant to Vehicle Code section 23550 (formerly § 23175), and was also used as an enhancement to increase the defendant's sentence by one year pursuant to section 667.5, subdivision (b). The defendant argued that the dual use of the prior conviction violated section 654.

First, the Supreme Court distinguished between sentence enhancements which go to the nature of the offender and reflect the defendant's status as a repeat offender, and those which go to the nature of the offense and reflect what the defendant did when the current crime was committed. (*People v. Coronado, supra,* 12 Cal.4th at pp. 156-157.) The Supreme Court stated that the section 667.5, subdivision (b) enhancement fell into the first category and *specifically limited* its analysis to determining whether section 654 barred the enhancement in the case before it. (*People v. Coronado*, *supra*, at pp. 156-157.)

The Supreme Court concluded that section 654 was inapplicable in *Coronado*. (*People v. Coronado*, *supra*, 12 Cal.4th at p. 158.)

> "We find the reasoning of [*People v. Rodriguez* (1988) 206 Cal.App.3d 517, 519-520] persuasive. As explained above, prior prison term enhancements are attributable to the defendant's status as a repeat offender [citations]; they

> are not attributable to the underlying criminal conduct which gave rise to the defendant's prior and current convictions. Because the repeat offender (recidivist) enhancement imposed here does not implicate multiple punishment of an act or omission, section 654 is inapplicable." (*Ibid*.)

Vargas asserts that because the Supreme Court troubled to differentiate between enhancements which are imposed because of the nature of the offender and those imposed because of the nature of the offense, it impliedly concluded that enhancements which go to the nature of the offense implicate section 654.

This tortured analysis finds support in *People v. Arndt*, *supra*, 76 Cal.App.4th 387 where the defendant caused an automobile accident while under the influence of cocaine.[7] The accident resulted in serious injuries to the three occupants in the other vehicle. The trial court sentenced the defendant to the upper term on the first count enhanced by two 1-year enhancements applicable to two of the victims (Veh. Code, § 23182), a five-year enhancement for the most seriously injured victim (§ 12022.7, subd. (b)), and two 3-year enhancements for the other two victims (§ 12022.7, subd. (a)). (*People v. Arndt*, *supra*, at p. 392.)

The defendant argued that some or all of the enhancements were barred by section 654. The appellate court first considered the question of whether section 654 applied to enhancements. Relying on the above distinction in *Coronado*, the appellate court concluded that section 654 applied because the enhancements at issue were related to the circumstances of the offense. (*People v. Arndt*, *supra*, 76 Cal.App.4th at pp. 395-396.) The appellate court held that while section 654 did not bar multiple enhancements for violation of section 12022.7, it did bar imposition of enhancements for both section 12022.7 and Vehicle Code section 23182 because each enhancement was based on the same injury. (*People v. Arndt*, *supra*, at pp. 396-397.)

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[7]The defendant was found to have cocaine in his pocket and was charged in count two with transporting cocaine.

Neither party contends that section 654 is inapplicable to enhancements. Therefore, we need not address *Arndt*'s questionable reliance on *Coronado*. However, both *Arndt* and *Coronado* held that multiple enhancements may be imposed without offending section 654: *Arndt* for enhancements relating to the circumstances of the offense, and *Coronado* for enhancements relating to the nature of the offender. The issue is whether the same fact is being used to enhance the sentence more than once. If not, section 654 is inapplicable.

In this case, section 654 is inapplicable because the gang enhancement is only being used once to enhance Vargas's sentence. The remaining elements of his sentence, the underlying robbery term, and the enhancement for use of a firearm are unrelated to the finding that the crime was committed to promote a criminal street gang. While both enhancements are related to the circumstances of the offense, they are not based on the same fact, and do not implicate section 654.[8]

## IV. The Rejected Plea Bargain

Prior to this robbery, Vargas had been charged with carjacking. (§ 215, subd. (a).) The trial court rejected a plea agreement. However, the victims were no longer available, apparently having left the country, and the charges were dismissed.

The original probation report does not refer to the charge. However, the district attorney's statement in aggravation did so, and the district attorney requested the probation officer issue a supplemental report reflecting the charge. The probation officer complied.

Vargas contends that reference to the charge and the circumstances surrounding it by both the district attorney and the probation officer violated section 1192.4 and Evidence Code section 1153.

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[8]Vargas also contends he received ineffective assistance of counsel if any of the above arguments were waived for failure to object at trial. Since we find no error, we necessarily reject the ineffective assistance of counsel claim. (*People v. Hawkins* (1995) 10 Cal.4th 920, 950, disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 107.)

Section 1192.4[9] states in pertinent part that rejected pleas "may not be received in evidence in any criminal, civil, or special action or proceeding of any nature …." Evidence Code section 1153[10] precludes admission of any withdrawn plea or offer to plead guilty. Vargas cites several cases that held it was error to admit *at trial* offers to plead guilty or withdrawn guilty pleas to the charged crime. (*People v. Quinn* (1964) 61 Cal.2d 551, 554-555 (*Quinn*); *People v. Hamilton* (1963) 60 Cal.2d 105, 113-115 (*Hamilton*), disapproved on other grounds in *People v. Daniels* (1991) 52 Cal.3d 815, 864-866 and *People v. Morse* (1964) 60 Cal.2d 631, 642-648; *People v. Wilson* (1963) 60 Cal.2d 139, 156 (*Wilson*); *People v. Campbell* (1977) 66 Cal.App.3d 806, 808 (*Campbell*).)

Here, we are confronted with a different situation. The prior plea agreement was not admitted at trial, but was included only in information used for sentencing purposes. In addition, that plea agreement was not offered to the charged crime, but was offered to a different crime.

The rule seems to be that arrest data may be included in a probation report if it is supported by reliable evidence. (*People v. Santana* (1982) 134 Cal.App.3d 773, 781-782.) Vargas does not complain that the probation report contains the arrest data, but only that it refers to the rejected plea agreement. And while the cases which address section 1192.4 and Evidence Code section 1153 mainly deal with admissibility of withdrawn/rejected pleas at trial, these sections do not appear to be limited to use at trial but appear to apply to any use by the court.

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[9]Section 1192.4 states in full: "If the defendant's plea of guilty pursuant to Section 1192.1 or 1192.2 is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

[10]Evidence Code section 1153 states in full: "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

The People concede the reference was improper by arguing that Vargas did not suffer any prejudice by inclusion of the plea information. We agree.

Vargas relies on the cases referred to above in asserting reversal is required. However, the jury did not hear of the prior plea agreement or the prior charge when deciding the issue of guilt. Thus, *Wilson*, *Quinn*, *Hamilton*, and *Campbell* are distinguishable. In this case, the information was provided to the court, which was undoubtedly aware that the rejected plea agreement should not be considered. Moreover, the recommended sentence of the probation department did not change as a result of the supplemental report. All that is included in the supplement is the information on the arrest, charge, the plea bargain and the dismissal because of witness unavailability.

Our conclusion that the error was not prejudicial is also supported by the events at the sentencing hearing. The trial court did not make any reference to the rejected plea agreement in sentencing. Moreover, the trial court imposed a sentence considerably lower than that recommended by the probation department and requested by the prosecutor. In stating the factors in aggravation when imposing the upper term on count 1, the trial court did not give any indication that it viewed the rejected plea agreement as an aggravating factor. There is no reason to suspect that Vargas's sentence was increased simply because the trial court was aware that a prior plea agreement was rejected.

**V. Increased Sentence After Recall**

Section 186.30 provides that after a section 186.22, subdivision (b) enhancement is found to be true, the defendant must register with the chief of police of the city in which he or she resides. This registration requirement was not imposed as part of Vargas's original sentence. However, this original sentence was recalled at Vargas's request. When Vargas was resentenced, the trial court imposed the registration requirement along with other changes to the sentence. Vargas contends that imposition of the registration requirement impermissibly increased his sentence.

Section 1170, subdivision (d) provides that under certain circumstances the trial court may "recall the sentence and commitment previously ordered and resentence the

defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." Vargas's resentence was for a shorter period of confinement than his original sentence. Thus, the issue is whether the gang registration requirement resulted in an increased sentence.

Neither party has cited, nor has our research located, any case interpreting the "greater than the initial sentence" provision. Nor does Vargas explain how the registration requirement increases his sentence. His position apparently is that since it is a new condition, it must have increased his sentence. We conclude that the gang registration requirement does not do so.

Support for our conclusion is found in several cases that analyze ex post facto principles to implementation of the analogous registration requirement for sex offenders. (§ 290.)

In *People v. Castellanos* (1999) 21 Cal.4th 785, 792, 798 the Supreme Court held that the registration requirement for certain sex offenders did not violate ex post facto principles because registration statutes are considered regulatory, not penal. In *People v. Ansell* (2001) 25 Cal.4th 868, 893 the Supreme Court held that a statute which prevented defendants convicted of certain sex offenses from seeking relief from the conviction through the rehabilitation procedure in section 4852.01 did not violate ex post facto principles because it did not punish the defendant within the meaning of the ex post facto clause. In *People v. McVickers* (1992) 4 Cal.4th 81, 87-90 the Supreme Court held that a statute which required certain sex offenders to submit to an AIDS blood test did not violate ex post facto principles because it was not penal in nature. In *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1172-1178 the Supreme Court upheld the Sexually Violent Predators Act against an ex post facto challenge because it allowed crimes committed prior to enactment of the statute to be used to impose a commitment to a secure treatment facility. The Supreme Court held that the statute did not increase punishment for the qualifying crimes for various reasons, including protecting the public and treating dangerously ill persons. (*Ibid.*)

The purpose of the gang registration requirement appears to be similar to the purpose of section 290. This statute allows law enforcement to locate gang members, a purpose unrelated to punishment. (*People v. Castellanos*, *supra*, 21 Cal.4th at p. 792.) While determining whether a statute increases punishment for the purposes of section 1170, subdivision (d) is not an ex post facto analysis, these cases convince us that the similarities are sufficient to compel the conclusion that in this case Vargas's punishment has not been increased, and the restriction in section 1170, subdivision (d) has not been violated.

**DISPOSITION**

The judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Cornell, J.